IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

THURSDAY, THE 22ND NOVEMBER 2007 / 1ST AGRAHAYANA 1929

OP.No. 7190 of 2000(E)

PETITIONER:

P.M.ALAVI, P.W.D. CONTRACTOR,
MELMURI P.O., MALAPPURAM.

BY ADV. SRI.K.B.MUHAMED KUTTY

RESPONDENTS:

1. SALES TAX OFFICER (W.C. & L.T.),
   OFFICE OF THE DEPUTY COMMISSIONER,
   COMMERCIAL TAXES, MALAPPURAM.

2. STATE OF KERALA, REPRESENTD BY THE
   CHIEF SECRETARY, SECRETARIAT,
   THIRUVANANTHAPUREAM.

BY GOVERNMENT PLEADER T.C.R. CHAND

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ALONG WITH OP NO. 7732 OF 2000 AND OTHER CONNECTED CASES, ON 22/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP.NO.11990/2000 & 9388/2001IN O.P.NO.7190/2000

Dismissed.

22/11/2007 Sd/- P.R.RAMAN, JUDGE.

APPENDIX

PETITONER'S EXTS:

EXT.P1 TRUE COPY OF THE ASSESSMENT ORDER FOR 1994-95 ISSUED BY THE IST RESPONDENT TO THE PETITIONER DTD. 30/9/99.

EXT.P2 TRUE COPY OF THE ASSESSMENT ORDER FOR 1995-96 ISSUED BY THE IST RESPONDENT TO THE PETITIONER DTD. 30/9/99.

EXT.P3 TRUE COPY OF THE ASSESSMENT ORDER FOR 1996-97 ISSUED BY THE IST RESPONDENT TO THE PETITIONER DTD. 30/9/1999.

EXT.P4 TRUE COPY OF THE ASSESSMENT ORDER FOR 1997-98 ISSUED BY THE IST RESPONDENT TO THE PETITIONER DTD. 30/9/99.

EXT.P5 TRUE COPY OF THE ASSESSMENT ORDER FOR 1998-99 ISSUED BY THE IST RESPONDENT TO THE PETITIONER DTD. 30/9/99.

EXT.P6 TRUE COPY OF THE PETITION FOR 1994-95 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT DTD.28/12/99.

EXT.P7 TRUE COPY OF THE PETITION FOR 95-96 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT DTD. 28/12/99.

EXT.P8 TRUE COPY OF THE PETITION FOR 96-97 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT DTD. 28/12/99.

EXT.P9 TRUE COPY OF THE PETITION FOR 97-98 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT DTD. 28/12/99.

EXT.P10 TRUE COPY OF THE PETITION FOR 98-99 SUBMITTED BY THE PETITIONER TO THE IST RESPONDENT DTD.28/12/99.

EXT.P11 TRUE COPY OF THE NOTICE ISSUED BY THE IST RESPONDENT TO THE PETITIONER DTD.8/2/2000.

P.R.RAMAN, J.

O.P.Nos.7190, 7732,7762 &
7775 OF 2000

Dated this the day 22nd day of November 2007

JUDGMENT

These writ petitions are filed by different assessees under the Kerala General Sales Tax Act. Petitioners are P.W.D. Contractors engaged in works contract. They have opted to pay tax at compounded rate at the rate of 2% as provided under Section 7(7) of the Kerala General Sales Tax Act. By virtue of Section 7B the awarder is bound to deduct tax at source at the time of payment of the bill at the rate of 2%. Since in these cases the tax liability is at compounded rate and the tax deducted at source being at the same percentage, no further liability on the part of the contractors to pay any amount of tax arose, since the entire amount of tax payable by them at such compounded rate has been deducted at source. Assessments were completed and it was found that the deduction at source made by the awarder and paid over to the department is in excess of the actual tax due and payable by the assessee. Now I may proceed to consider the case in O.P.No.7190/2000. The assessment orders produced in O.P.No.7190/2000 are Exts.P1 to P5 for the years 1994-95, 1995-96, 1996-97, 1997-98 and

1998-99. In Ext.P1 order it was found that the excess amount paid is Rs.1,17,765/-. But the payment was confirmed under Section 7(12) of the K.G.S.T. Act thereby in effect the excess amount was forfeited and no refund of the excess amount paid was given nor adjusted against the surcharge payable by the assessee. Similar is the case in the subsequent assessment orders, except the difference in the quantum of the excess amount paid. The petitioner, after completion of the assessment, demanded that whatever excess amount he has paid over the tax liability, may be adjusted towards surcharge payable and to refund the balance amount due to him. Exts.P6 to P9 are the applications submitted before the Sales Tax Officer. But the Sales Tax Officer by a one line order, Ext.P11 dated 8/2/2000, informed the petitioner that the assessment orders have been passed strictly in accordance with law and no modification is required. No reasons are stated. Curiously enough for non-payment of surcharge, the petitioner is also levied interest payable thereon.

2. In the other original petitions, though applications were made, no orders as such are passed by the Sale Tax Officer. But the fact remains that there were assessments in those cases also and applying Section 7(12) of the Act excess payment has been confirmed. Aggrieved by such circumstances, the petitioner has approached this Court and placed

reliance on the unreported decision of this Court in O.P.No.32270/2001 dated 3rd March, 2006 wherein the learned Single Judge of this Court drew the distinction between the excess tax collected and excess tax remitted and held that Section 46A(1) of the K.G.S.T. Act provides for forfeiture of excess tax collected. That provision has no application towards the excess tax remitted. To add I may say even

when the assessee contests the matter and because of the fact that he has not obtained a stay, he might have paid the tax. So however, if it is found that the tax liability is either reduced or found to be nil, he is certainly entitled for refund of the excess tax paid. Unless it is a case where he has already collected tax, of course in which case the specific provision contained in Section 46 of the Act will govern. This Court in such circumstances, held that the provisions contained in Section 46A(1) of the Act has no application in a matter where the tax remitted is in excess. Therefore, based on Section 46A(1), as rightly held by this court in the aforesaid decision, there cannot be any forfeiture of the excess tax remitted by the petitioner. So however, the learned Government Pleader appearing on behalf of the State would contend that by virtue of Section 7 (12) of the K.G.S.T. Act, the assessee will not be entitled for refund, as evidenced by the order of assessment produced in the case. According to him, this Court in the earlier decision had no occasion to refer to the provisions contained in Section 7(12) of the Act. Therefore, whether by virtue of Section 7(12) of the Act, confirmation of the excess tax paid without refunding the same or adjusting the same against the surcharge payable arises for consideration. Section 7(12) of the K.G.S.T. Act reads as follows:

> "After the close of the year or at the completion of the works contract and on receipt of final statement of accounts and return, if the tax on purchases is found to be in excess of the tax payable under the compounded rates, no refund of such excess tax paid shall be made."

3. On a plain reading of the above section it can be seen that if any tax on purchases is found to be in excess of the tax payable under the compounded rates, then certainly no refund of such tax paid shall be made. Therefore, what is paid in excess should be the tax on purchases. Section 7A of the Act, which specifically refers to the tax on purchases, reads as follows:

> "Notwithstanding anything contained in sub-section (1) of Section 5 every contractor not covered by sub-section (7) may at his option, instead of paying tax in accordance with the said Section, pay tax on the whole amount of contract at the rate of seventy percent of the rates shown in the Fourth Schedule against such contract, less any tax paid by him under this Act on the purchase of any goods used in such contract, the transfer of which to the works contract was effected without any processing or manufacture."

4. Therefore, Section 7(12) is directly referable to the tax on purchases covered under Section 7A. Further Section 7A provides for payment of tax at 70% and while paying 70% a further deduction of the tax paid by the assessee on the purchase of goods is also allowed. Therefore, Section 7 (12) provides that in such cases the excess tax paid

on purchases need not be refunded. Whereas in the present case the tax paid at compounded rate by the assessee is under Section 7 of the Act wherein the question of any deduction of tax does not arise. Further the assessee has no option in the matter of deduction at source, since even the statute mandates the awarder to deduct at source. So ultimately if it is found, at the time of assessment, any further tax liability, certainly the assessee will be obliged to pay such excess and if it is found that such tax paid before the completion of the assessment is in excess over his liability, necessarily he should be given refund of the amount after adjusting any balance due or surcharge due under the order of assessment. In this case, there is a further liability on the assessee to pay surcharge. Therefore, whatever excess amount paid by him has to be adjusted against the surcharge payable and if there is any further excess, necessarily the assessee is entitled for refund of the same. The confirmation under Section 7(12) of the Act in such circumstances, is wholly unauthorised and without jurisdiction. The assessment orders to the extent of confirmation under Section 7(12) are set aside. Ext.P11 in O.P.No.7190/2000 is quashed. The assessment orders in the other connected original petitions to the extent confirmation is made under Section 7(12) of the Act are quashed. The Assessing Authority shall pass consequential orders

refunding the balance amount due to the petitioners/assessees, after adjustment of the surcharge payable by them against such excess tax already paid. It shall be done expeditiously.

Original Petitions are allowed.

P.R.RAMAN,
Judge.

kcv.

P.R.RAMAN, J.

O.P.NOS.7190,7732, 7762 & 7775 OF 2000

JUDGMENT

22nd November, 2007